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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act (NEPA) overrides the broad rulemaking authority of the Nuclear Regulatory Commission (NRC) to make predictions as to the probable generic environmental impacts of its proposed licensing actions, requiring instead that any generic NEPA rules be based upon an improbable event that would produce the most severe future environmental impact?

2. Whether, in evaluating environmental effects of licensing a nuclear plant, NEPA requires the NRC to quantify in each licensing proceeding theoretical environmental impacts that might result from the occurrence of highly improbable future events?

3. Whether NEPA restricts the authority of the NRC to determine how environmental impacts will be disclosed by dictating that the Commission cannot make generic predictions as to environmental impacts without also explicitly interpreting those impacts in terms of human health and the environment and in terms that a court will find to be understandable to a layman?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

BALTIMORE GAS AND ELECTRIC COMPANY, BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CONSUMERS POWER COMPANY, LONG ISLAND LIGHTING COMPANY, NORTHEAST UTILITIES SERVICES COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, NORTHEAST NUCLEAR ENERGY COMPANY, WESTERN MASSACHUSETTS ELECTRIC COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, PENNSYLVANIA POWER & LIGHT COMPANY, PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, VIRGINIA ELECTRIC AND POWER COMPANY, YANKEE ATOMIC ELECTRIC COMPANY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Baltimore Gas and Electric Co., *et al.*,[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of

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[1] Baltimore Gas and Electric Co., *et al.*, were respondent-intervenors in Case Nos. 74-1586, 77-1448, 79-2110, and 79-2131 below. A list including the names of the companies which comprise Petitioners Baltimore Gas and Electric Co., *et al.*, and all parent

Columbia Circuit entered in this proceeding on April 27, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals in *Natural Resources Defense Council, Inc., et al. v. Nuclear Regulatory Commission, et al.*, Nos. 74-1586, 77-1448, 79-2110, 79-2131 (D.C. Cir. April 27, 1982) is not yet officially reported. Copies of the majority opinion of Senior Judge Bazelon, the concurring opinion of Chief Judge Edwards, sitting by designation, and the dissenting opinion of Judge Wilkey appear in the Appendix hereto (hereinafter referenced as "*App.* ——").

JURISDICTION

The judgment of the Court of Appeals for the D.C. Circuit was entered on April 27, 1982. Timely Petitions for Rehearing and Suggestions for Rehearing En Banc were denied on June 30, 1982 (*App.* 188a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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companies, subsidiaries, and affiliates is contained in the appendix to this petition pursuant to Rule 28.1 of this Court. Other parties to the proceeding below are described in this footnote. The Natural Resources Defense Council, Inc. was the petitioner in Case Nos. 74-1586, 77-1448, and 79-2131; Consolidated National Intervenors were petitioners in Case No. 74-1586; and the State of New York was the petitioner in Case No. 79-2110. The United States Nuclear Regulatory Commission and the United States of America were respondents in all of these proceedings. Pacific Legal Foundation was a respondent-intervenor in No. 77-1448; the State of Wisconsin was an intervenor in No. 79-2110; and Tennessee Valley Authority was a respondent-intervenor in Nos. 79-2110 and 79-2131. Commonwealth Edison Co., The Detroit Edison Company, Exxon Nuclear Company, Inc., Niagara Mohawk Power Corporation, Omaha Public Power District, Power Authority of the State of New York, Public Service Company of Indiana, Inc., and Rochester Gas and Electric Corporation were respondent-intervenors in Nos. 77-1448, 79-2110, and 79-2131.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. Administrative Procedure Act §§ 5, 10(e), 5 U.S.C. §§ 553, 706 (1976) (*App.* 391a).
2. Atomic Energy Act of 1954 §§ 1-3, 161, 42 U.S.C. §§ 2011-2013, 2201 (1976) (*App.* 394a).
3. National Environmental Policy Act §§ 101, 102, 42 U.S.C. §§ 4331, 4332 (1976) (*App.* 430a).
4. 39 Fed. Reg. 14,191, *et seq.* (April 22, 1974) (Original Table S-3 Rule) (*App.* 237a).
5. 42 Fed. Reg. 13,805, *et seq.* (March 14, 1977) (Interim Table S-3 Rule) (*App.* 254a).
6. 44 Fed. Reg. 45,371, *et seq.* (August 2, 1979) (Final Table S-3 Rule) (*App.* 378a).

STATEMENT OF THE CASE

This Petition is the latest stage in the Nuclear Regulatory Commission's [2] now epic "Table S-3" rulemaking on the uranium fuel cycle,[3] which was before the Court

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[2] The Atomic Energy Commission (AEC) was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976), which also created the Nuclear Regulatory Commission (NRC) and transferred to it the AEC's licensing and regulatory functions, 42 U.S.C. §§ 5814(a), 5841(a),(f), 5871, *App.* 415a; 419a-422a. Hereinafter, "Commission" applies to both the AEC and the NRC.

[3] Uranium fuel for nuclear power plants is produced, used, and reclaimed in a multistep "fuel cycle" ending with the disposal of residual wastes. In November 1972, the AEC began what was to become a series of rulemakings to collect and summarize information on the environmental effects of each step in the uranium fuel cycle associated with operation of an individual nuclear power plant. The results of these rulemakings, crystallized in the so-called Table S-3, 10 C.F.R. § 51.20(e) (1982), have been used in more than 90 individual environmental impact statements prepared as part of the NRC's review of every proposed nuclear power plant.

earlier in the lankmark case of *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). Subsequent to this Court's reversal of the Court of Appeals for the District of Columbia Circuit in that case, the NRC conducted further, more detailed rulemaking proceedings to comply with the NEPA[4] requirement that nuclear power plant environmental impacts be considered and disclosed.[5] Upon the appeal of Natural Resources Defense Council (NRDC), a divided panel of the Court of Appeals for the D.C. Circuit again reversed the Commission in an opinion written by Senior Judge Bazelon. Judge Wilkey dissented on all issues relevant to this petition. Judge Edwards, sitting by designation, concurred in part and dissented in part. *See NRDC v. NRC*, No. 74-1586 (D.C. Cir. April 27, 1982) (hereinafter *"NRDC II"*), *App.* 1a-181a.

This petition for certiorari is being filed by Baltimore Gas and Electric Company, *et al.*—a group of 18 electric utilities. Petitioners own or operate 27 of the approximately 90 power plants affected by Table S-3—19 units with construction permits and 8 units with operating licenses. The effects on these units of vacating Table S-3 could be enormous. *See infra* text at 24-25.

I. Procedural Background

The background to this case includes three rulemaking proceedings, described in the prefatory statement to the final Table S-3 rule, 44 Fed. Reg. 45,362, 45,364-67 (1979), *App.* 348a-360a, two decisions by the D.C. Circuit and a decision by this Court. The tortuous history of this case is summarized below.

A. *NRDC I—The Vermont Yankee Case*

The initial Table S-3 rule ("Original Rule") was promulgated by the AEC on April 22, 1974, pursuant to its broad authority under the Atomic Energy Act, 42 U.S.C.

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[4] 42 U.S.C. § 4321, *et seq.* (1976), *App.* 430a-434a.

[5] 42 U.S.C. § 4332, *App.* 431a-434a.

§§ 2011-2013, 2201 (1976), to issue necessary rules and regulations.[6] The Table S-3 rule implemented the NEPA requirement that the Commission consider and disclose the environmental effects of licensing an individual nuclear power plant, addressing generically certain secondary environmental effects common to all plants (*i.e.*, those effects associated with the processing of nuclear fuel used at, and with the disposal of nuclear waste produced by, an individual plant).

The Original Rule was challenged in its entirety by the NRDC.[7] In 1976, the Court of Appeals vacated, on procedural grounds, those portions of the Original Rule deal-

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[6] 42 U.S.C. § 2201(p), *App.* 406a; 39 Fed. Reg. 14,188 (1974), *App.* 224a-239a. The Atomic Energy Act, like many other administrative statutes (*see generally* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 470 (D.C. Cir. 1974)), sets forth only general policy objectives for regulation and establishes a basic procedural framework for the promulgation of standards. The Commission is given broad authority to decide whether to resolve a matter through generic rulemaking or adjudication (*see* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 544-545 (1978); NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-95 (1974) *overruled on other grounds sub nom.* NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)), and to fill out the substance of the particular regulation in question. *See Industrial Union Dep't*, 499 F.2d at 474. *See also* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1257 (D.C. Cir. 1973). NEPA supplements the Commission's Atomic Energy Act responsibilities by requiring that the NRC consider and disclose probable environmental impacts of its proposed regulatory actions.

[7] In addition, several individual licenses which were based in part on these rules were challenged by the NRDC and others. These proceedings have been held in abeyance pending the outcome of the litigation concerning the generic Table S-3 rules. Lloyd Harbor Study Group, Inc. v. NRC, No. 73-2266 (D.C. Cir.); Aeschliman v. NRC, No. 73-1776 (D.C. Cir.); Saginaw Valley Study Group v. NRC, No. 73-1867 (D.C. Cir.); NRDC v. NRC, No. 74-1385 (D.C. Cir.); Coalition for the Environment v. NRC, 77-1905 (D.C. Cir.); and New England Coalition on Nuclear Pollution v. NRC, No. 76-1525 (1st Cir.). *See infra* note 46.

ing with the environmental effects of those steps following the use of the fuel in a nuclear power plant (*i.e.*, the removal, storage, and disposal of spent nuclear fuel)[8] referred to as the "back end" of the uranium fuel cycle.[9] Senior Judge Bazelon, writing for the court, found that NEPA required the NRC to employ rulemaking procedures beyond those minimum procedures required by the Administrative Procedure Act (APA)[10] with respect to the "back end" portion of the Original Rule, and that the NRC had not complied with these additional procedures. *NRDC I*, 547 F.2d at 653.[11]

This Court in *Vermont Yankee*, 435 U.S. 519 (1978), reversed the decision of the D.C. Circuit in *NRDC I*. This Court held that the lower court had misinterpreted NEPA to impose additional procedural requirements on the Commission in the Table S-3 rulemaking. This Court emphasized that the Commission had complied with the informal notice and comment requirements of § 553 of the APA, and that NEPA did not require any more.[12]

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[8] This includes the ultimate long-term disposal of both spent fuel and any wastes resulting from the reprocessing of that fuel.

[9] The Rules dealing with the "front end" of the uranium fuel cycle were found by the Court of Appeals to have an adequate basis in the record. NRDC v. NRC, 547 F.2d 633, 647 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (hereinafter "*NRDC I*").

[10] 5 U.S.C. § 553 (1976).

[11] In a concurring opinion, Judge Tamm disagreed with the holding that these rules were invalid on procedural grounds. However, he questioned the sufficiency of the record underlying the "back end" of the rule, finding that "the inadequacy of the record demands that we remand this case to the Commission in order to ensure that it has taken a hard look at the waste storage issue." *NRDC I*, 547 F.2d at 658.

[12] *Vermont Yankee*, 435 U.S. at 548. *See also* Kleppe v. Sierra Club, 427 U.S. 390, 405-406 (1976). The Court's opinion in *Vermont Yankee* expressly recognized that considerations of due process might require the case-by-case granting of procedures in informal rulemaking beyond the notice and comment procedures of § 553 of

This Court thus set aside those portions of the lower court's order and opinion imposing further procedural requirements on the Commission based on NEPA, and remanded the Original Rule to the D.C. Circuit with explicit instructions to determine whether as a substantive matter the NRC had complied with § 706 of the APA by taking a "hard look" at the waste disposal issue.[13]

B. *The "Interim" and "Final" Rulemakings*

After the Court of Appeals had vacated the Original Rule in *NRDC I*, and concurrent with this Court's review of that rule in the *Vermont Yankee* case, the NRC began a new rulemaking to develop additional information to define more fully the basis for its conclusions as to the environmental effects of the back end of the uranium fuel cycle.[14] In 1977, the Commission issued an interim fuel cycle rule ("Interim Rule") effective for 18 months, to replace the back end portions of the Original Rule.[15] The Interim Rule was immediately appealed by the NRDC. The Court of Appeals, on July 21, 1977, suspended briefing and argument pending the outcome of a final Table S-3 rulemaking.[16]

After the issuance of the Interim Rule, the Commission on May 26, 1977 instituted an even more extensive proceeding to further address the effects of the back end of the uranium fuel cycle.[17] On August 2, 1979, those efforts culminated in the publication of a final fuel cycle rule ("Final Rule").[18]

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the APA, but held that these circumstances were not present in that case. *Vermont Yankee*, 435 U.S. at 542.

[13] *Vermont Yankee*, 435 U.S. at 549.

[14] 41 Fed. Reg. 45,849 (1976); 41 Fed. Reg. 34,707 (1976).

[15] 42 Fed. Reg. 13,803 (1977), *App.* 240a-258a.

[16] Order, NRDC v. NRC, No. 77-1448 (D.C. Cir. July 21, 1977), *App.* 195a.

[17] 42 Fed. Reg. 26,987, 26,989 (1977).

[18] 44 Fed. Reg. 45,362 (1979), *App.* 341a-390a.

A primary goal of the Commission in developing the Final Rule was to prepare a conservative estimate of the potential environmental impacts of disposal of the radioactive waste generated by an individual nuclear power plant.[19] This goal was fostered by two conservative assumptions used in the Commission staff's analysis. First, the staff assumed that one hundred percent of all volatile radioactive materials (the products which would normally be expected to be available for release from either a short-term or long-term repository) would in fact be released to the environment. Second, the staff assumed that these materials would all be released before final sealing of the long-term waste repository (*i.e.*, before natural radioactive decay had depleted the inventory available for release). These assumptions tend to overstate the amount of radioactivity expected to be released to the environment, and thus clearly posit an upper bound value for potential radioactive releases.[20] The Commission reflected the values resulting from its analysis of releases prior to permanent disposal in the Table S-3 rule.[21] The estimated environmental impact of permanent (*i.e.*, post-sealing) disposal, then, was based on the likelihood that the remaining *nonvolatile* portion of the waste could be effectively isolated from the environment.[22]

With respect to permanent disposal of the nonvolatile waste, the NRC staff chose to analyze intensively the long-term waste disposal method which the Commission

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[19] *See* 44 Fed. Reg. 45,362 (1979), *App.* 341a.

[20] The assumption of release prior to emplacement in a repository has two further effects which also tend to make the Table S-3 estimates conservative. First, by ignoring the shielding inherent in geological burial and advancing the time of (and hence increasing the inventory of fission products available for) release, the estimate tends to be conservative. Also, by making the final results insensitive to the construction and performance characteristics of a long-term waste repository, these assumptions make the estimates less sensitive to uncertainties concerning the environmental impacts of waste repositories.

[21] 44 Fed. Reg. 45,368, col. 1 (1979), *App.* 365a.

[22] *Id.* at col. 2, *App.* 365a-366a.

concluded was most likely to be developed, and about which there was the most extensive information available —burial of wastes in bedded-salt geologic repositories. The staff examined the possibility of repository failure from both commonplace occurrences, such as long-term corrosion and leakage, and unusual occurrences, such as meteorite strikes, sabotage, and random drilling. The NRC staff conducted these analyses so as to incorporate substantial conservatism in its estimate.[23]

After reviewing all of this information, the Commission

> conclude[d], having noted that uncertainties exist, that for the limited purpose of the fuel cycle rule it is reasonable to base impacts *on the assumption which the Commission believes the probabilities favor, i.e., that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere.*

44 Fed. Reg. at 45,369, cols. 1-2 (emphasis added), *App.* 369a.[24] The Commission further concluded, based on the staff findings of extremely low probabilities of repository

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[23] *Id.* at 45,369, col. 2, *App.* 370a.

[24] The Commission noted that its goal "*was not to produce an exhaustively comprehensive table of precisely accurate figures as to which all uncertainty had been eliminated.*" *NRDC II*, slip op. at 27 (Wilkey, J. dissenting) (emphasis in original), *App.* 134a. Rather, in recognition of, *inter alia*, (1) the ongoing and wide-ranging efforts of the NRC to evaluate long-term waste disposal issues in its concurrent "waste confidence" rulemaking, 44 Fed. Reg. 61,372 (1979); (2) the concern that individual licensing boards did not have as much expertise as the NRC to deal with this complex, generic issue; and (3) the desire to avoid unnecessary and possibly inconsistent review of these peripheral issues in each individual licensing proceeding, the Commission decided to exercise its authority to consider and resolve in a generic proceeding uncertainties affecting possible environmental impacts of waste disposal associated with an individual plant. *See NRDC II*, slip op. at 21-28 (Wilkey, J. dissenting), *App.* 138a-144a.

failure from either commonplace or unusual occurrences and the assumption that all volatile radioactive products would be released before final sealing of the repository, "that taking post-sealing releases as zero does not significantly reduce the overall conservatism of the table." [25]

The Commission's characterization of the environmental effects of the back end of the fuel cycle was the cumulative product of over eight years of work, thousands of pages of discovery, prehearing testimony, and other support documents, more than two weeks of public hearings, and numerous other comments and rebuttal filings by all interested parties. The massive record underlying this determination encompassed not only the technical questions strictly within the scope of the rule, but also various matters left open for discussion in individual licensing proceedings, such as socioeconomic effects, cumulative impacts and health effects.[26]

This Final Rule, like the Original Rule and the Interim Rule, was immediately challenged by the NRDC in the D.C. Circuit. That court consolidated that appeal with the remanded Original Rule proceeding and the suspended Interim Rule proceeding.[27] The parties to these proceedings stipulated that the record for review of these rules would consist of all the information developed in support of the Original, Interim, and Final Rules.[28] In spite of the extensive rulemaking record, the D.C. Circuit found new substantive dimensions to NEPA on the basis of which the court set aside the Original, Interim, and Final Rules.[29]

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[25] 44 Fed. Reg. 45,369, col. 2 (1979), *App.* 370a.

[26] *See* 44 Fed. Reg. 45,371, col. 1 (1979), *App.* 376a.

[27] Order, NRDC v. NRC, Nos. 74-1586, *et al.* (D.C. Cir. February 11, 1980), *App.* 210a-211a.

[28] *See NRDC II*, slip op. at 19 n.39 (Bazelon, J.), *App.* 19a.

[29] *NRDC II*, slip op. at 69 (Bazelon, J.), *App.* 69a.

II. The Latest Opinions of the Court of Appeals

The latest decision of the court below is contained in three lengthy opinions. The first, by Senior Judge Bazelon, invalidated on substantive grounds the portions of the Table S-3 rule dealing with the environmental effects of the back end of the uranium fuel cycle, but sustained the Commission's finding that construction and operation of waste management facilities is economically feasible. The second opinion, by Chief Judge Edwards of the Sixth Circuit, concurred with Judge Bazelon in invalidating the back end portions of the Table S-3 rule but disagreed with him on the question of the economic feasibility of fuel cycle facilities.[30] The third opinion, by Judge Wilkey, dissented from Judge Bazelon's invalidation of the back end of the Table S-3 rule, but concurred with Judge Bazelon in his finding of economic feasibility.

Judge Bazelon, in vacating the Table S-3 rules, interpreted the "adverse effects" language in NEPA[31] to require the NRC to equate the mere possibility that an event having severe environmental consequences might occur (*i.e.*, the failure to develop permanent waste storage facilities) with the actual occurrence of that event. Based on this interpretation, Judge Bazelon concluded

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[30] *NRDC II*, slip op. at 46, 47 (Edwards, J. concurring and dissenting), *App.* 115a, 116a. In those portions of his lengthy opinion which concur with Judge Bazelon, Judge Edwards characterizes the instant case as involving "review [of] the continuing effort of the NRC to pit human intelligence against the most primordial force of nature" and speculates that it "may prove to be one of the most important cases to be decided by the United States courts in this century." *Id.* at 1, *App.* 70a. His opinion is premised on use of plutonium as a reactor fuel—a nuclear fuel cycle configuration excluded from the scope of the Table S-3 rule, *see* 44 Fed. Reg. 45,362 (1979), *App.* 342a—and consists of a 47-page polemic about the dangers of plutonium. His opinion ignores the Commission's limitation of the scope of the Table S-3 rule, and concludes that omission of the plutonium fuel cycle from the scope of the rule necessarily invalidates it. *NRDC II*, slip op. at 46 (Edwards, J. concurring and dissenting), *App.* 115a.

[31] 42 U.S.C. § 4332(C) (1976).

that NEPA prevents the NRC from basing its estimate of future environmental impacts on a prediction that safe waste disposal facilities will be developed. Rather, because such development is "uncertain" (*i.e.*, less than one hundred percent probable), any estimates of future impacts must, according to Judge Bazelon, be based upon the assumption that the facilities will not be developed.[32] Since the NRC generically resolved uncertainties in the Table S-3 rulemaking on the basis of the most probable future result rather than the one that would produce the most severe result, Judge Bazelon found the rule deficient and reversed and remanded it. In sum, NEPA requires, according to Judge Bazelon, a gloss of gloom and doom in predictive decision-making in agency rulemaking.

Judge Bazelon also objected to how the NRC disclosed environmental impacts in Table S-3. Interpreting the Original and Interim Rules to preclude consideration of the health, socioeconomic and cumulative consequences of fuel-cycle activities in individual licensing proceedings, he found that these rules contained another violation of NEPA. *NRDC II*, slip op. at 60 (Bazelon, J.), *App.* 60a. He reached this conclusion despite earlier statements by the Commission that such consequences could be considered in individual licensing proceedings, and in the absence of any showing that consideration of such consequences had ever been excluded from an individual licensing proceeding. *See infra* note 44.

Judge Bazelon's novel interpretations of NEPA were not raised, or even hinted at, the last time these rules were before the lower court.

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[32] *NRDC II*, slip op. at 36-37 nn.100, 101 (Bazelon, J.), *App.* 36a-37a. Judge Bazelon would allow the Commission to "discount" the adverse impacts resulting from such a highly improbable event by its probability of occurrence. If the NRC is unable, or unwilling, to perform this judicially imposed "probabilistic analysis," the NRC's environmental impact statement must incorporate the "worst case" impacts resulting from the occurrence of the improbable event. *Id.*; *see infra* note 37.

Judge Wilkey found no merit in the majority's holdings. First, Judge Wilkey rejected Judge Bazelon's new substantive standard for gauging agency rulemaking under NEPA. *NRDC II*, slip op. at 64 (Wilkey, J. dissenting), *App.* 180a. He then responded to this Court's direction in *Vermont Yankee* to determine on remand whether the Agency had taken a "hard look" at the waste disposal issue. *Id.* at 64-65, *App.* 180a-181a. With respect to the Commission's factual findings, he found substantial support in the rulemaking record for the necessary factual underpinnings. *Id.* at 49-52, *App.* 165a-168a. Applying the APA standard to the NRC's policy determination, he found that the Commission's policy choice of what it regarded as the most probable environmental impacts was not "arbitrary and capricious."

On June 11, 1982, petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc with the D.C. Circuit, asking that court to correct its decision since it contradicted the decision of this Court in *Vermont Yankee*. This petition was denied on June 30, 1982, *App*, 188a-189a. Judges Bork, Edwards, MacKinnon, and Tamm (4 of the 11 active judges on the Circuit) recused themselves in the case, and Judge Wright did not participate in the order. Judge Wilkey wrote that he did not request a vote on the Suggestion for Rehearing in order to expedite consideration of this case by this Court. *App.* 189a.

This petition for certiorari is being filed in order to resolve the general conflict between the D.C. Circuit's decision and the decisions of this Court, and to correct the D.C. Circuit's misinterpretation of NEPA to limit severely the discretion of all Federal agencies to make definitive predictions as to future events.

REASONS FOR GRANTING THE WRIT

Petitioners come to this Court because the decision below threatens to disrupt agency rulemaking both by confusing the scope and the nature of the substantive re-

quirements of NEPA and by vacating the Original and Interim Rules on the basis of a new and improper judicial interpretation of those rules. The decision below casts a cloud of uncertainty over petitioners' construction permits and operating licenses which were issued pursuant to those rules.

Judge Bazelon's opinion ignores this Court's narrow directive that the D.C. Circuit review the record to determine whether the NRC had given the waste disposal issue a "hard look." Instead of applying this standard to review the rulemaking determinations made by the NRC, Judge Bazelon erroneously interprets NEPA to impose substantive constraints on the policy choices available to the NRC, drastically limiting the NRC's authority to deal with future unknowns in administering the Atomic Energy Act.

This decision of the D.C. Circuit will permit Federal courts to second guess agency policy determinations under the guise of ensuring compliance with substantive obligations created by its interpretation of NEPA. Such an alteration of the role of NEPA in agency decision-making is particularly telling when it comes from the Court of Appeals for the District of Columbia Circuit—a court which is uniquely positioned to shape agency practice in this country.

For the reasons discussed below, certiorari should be granted in order to correct this serious departure from earlier decisions of this Court and the intrusion of the D.C. Circuit into the agency decision-making process.

I. The Decision of the D.C. Circuit Conflicts With the Decisions of This Court in *Vermont Yankee v. NRDC* and *Strycker's Bay Neighborhood Council v. Karlen*

In *Vermont Yankee*, this Court criticized the D.C. Circuit's interpretation of NEPA to require rulemaking procedures beyond those required in the APA. This case was thus previously remanded to the D.C. Circuit with the observation that NEPA did not impose substantive obliga-

tions on the NRC and with specific instructions to that court to conduct its review of the Table S-3 rules in accordance with the traditional APA § 706 standard of review.[33]

Later, in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), this Court again rejected the notion "that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations." *Id.* at 227. This Court thus rejected the attempt of the lower court to dictate to the agency in that case what weight to give specific considerations in its NEPA analysis.[34] In sum, *Vermont Yankee* and *Strycker's Bay* stand for the proposition that Federal courts cannot impose substantive NEPA obligations on Federal agencies.

Following this Court's remand in *Vermont Yankee*, the court below nevertheless vacated the Table S-3 rules on the basis of its conclusion that the NRC did not develop these rules according to a new and novel reading of NEPA which imposed substantive restrictions on the NRC's authority to resolve policy issues under NEPA.

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[33] The Supreme Court in *Vermont Yankee* emphasized that while NEPA requires that a detailed statement of environmental effects and alternatives to a proposed action be included in recommendations concerning major Federal actions (*e.g.*, whether to license a nuclear power plant), it does not dictate the form of that consideration. *Vermont Yankee*, 436 U.S. at 548; *NRDC II*, slip op. at 43-44 (Wilkey, J. dissenting), *App.* 159a-160a. Thus, in *Vermont Yankee*, this Court directed the D.C. Circuit to limit its inquiry on remand to the "contemporaneous explanation of the agency decision . . . [and to avoid] stray[ing] beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee*, 435 U.S. at 549.

[34] *Strycker's Bay*, 444 U.S. at 227. *See also* Izaak Walton League of America v. Marsh, 655 F.2d 346, 371-72 (D.C. Cir. 1981), *cert. denied sub nom.* Atchison, T. and S.F. R. Co. v. Marsh, 102 S.Ct. 657 (1981).

NRDC II, slip op. at 46-47, 69 (Bazelon, J.), *App.* 46a-47a, 69a. As with the lower court's first opinion in this case, this latest opinion is not a model of clarity.

The central premise of the majority's opinion appears to be that "uncertainties" underlying future environmental impacts should be treated as "adverse effects" under NEPA.[35] From this, the majority concludes that regardless of the scope of the NRC's rulemaking authority under the Atomic Energy Act,[36] NEPA requires that the Commission base its environmental assessments of individual power plants on estimates of *maximum possible impacts* that the NRC, in its judgment, has rejected as improbable (*i.e.*, the theoretical impacts that might result if permanent disposal facilities were *not* developed).[37] This places a "worst case" constraint on all

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[35] As Judge Wilkey states in his dissenting opinion, Judge Bazelon "once again disguises a strict substantive review under NEPA in a fundamentally procedural rubric." *NRDC II*, slip op. at 43 (Wilkey, J. dissenting), *App.* 159a. This Court should look beyond the D.C. Circuit's characterization of the standard of review it purportedly utilized, as this Court did in *Vermont Yankee*. *See Vermont Yankee*, 435 U.S. at 539-42.

[36] 42 U.S.C. § 2201(p) (1976).

[37] *NRDC II*, slip op. at 37 n.101, 46-47 (Bazelon, J.), *App.* 37a, 46a-47a. Thus, Judge Bazelon finds that even an extremely small chance that a permanent waste repository might not be built requires the Commission to reflect the environmental consequences of not building such a repository in its Table S-3 rule. *NRDC II*, slip op. at 41, 46-49 (Bazelon, J.), *App.* 41a, 46a-49a. While Judge Bazelon would apparently allow the potential adverse impacts of such a scenario to be offset by the likelihood that that scenario would occur, *id.* at 37 n.101, *App.* 37a, the NRC would be prohibited under this NEPA interpretation from exercising its rulemaking authority on the basis of its expert judgment as to the most probable future of nuclear waste disposal (*i.e.*, development of a permanent nuclear waste repository). *See also supra* note 32.

In his concurrence with a *per curiam* opinion by the D.C. Circuit in a still more recent case, Judge Bazelon elaborated on the type of review which he reads NEPA as requiring of agencies in assessing uncertain environmental impacts in individual licensing proceedings. Potomac Alliance v. NRC, 652 F.2d 1030 (D.C. Cir. 1982) (Bazelon, J. concurring). In the pertinent portion of this opinion, Judge

generic policy decisions of the NRC to which NEPA is applicable. The rationale of the majority below is thus inconsistent with this Court's rationale in *Vermont Yankee* and *Strycker's Bay* that NEPA does not impose substantive restrictions on a Federal agency's otherwise broad authority to resolve questions of policy under NEPA.[38]

Bazelon begins with a passage almost identical to the first two sentences of footnote 101 in his opinion in the instant case. Judge Bazelon then continues by asserting that, in implementing NEPA, an agency must first determine "whether the sum of *all reasonably foreseeable effects, discounted by the probability of their occurrence*, represents a 'significant' effect on the environment." *Id.* at 1037. (Bazelon J. concurring) (emphasis supplied). If this summing of effects shows that a "significant" effect might occur, then "the agency must issue an EIS analyzing the probabilistic facets" of all possible effects. *Id.* As a result, under Judge Bazelon's approach, an agency cannot satisfy NEPA by considering and disclosing uncertainties associated with the most probable environmental effect. Rather, the EIS must explicitly address all possible environmental effects, no matter how improbable. Absent the use of maximum "worst case" improbable impacts in each case, the uncertainties affecting the likelihood and magnitude of each environmental effect, no matter how improbable, must be evaluated.

This is reminiscent of Judge Bazelon's decision in Aeschliman v. NRC, 547 F.2d 622, 627-28 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee*, 435 U.S. 519 (1978), where he imposes on the NRC a burden to respond to energy conservation alternatives raised by petitioners, no matter whether those effects crossed a threshold of "reasonable availability." This Court emphatically rejected Judge Bazelon's intrusion into the agency decision-making process in that case, emphasizing the limited "role of the court in reviewing the sufficiency of an agency's consideration of environmental factors." *Vermont Yankee*, 435 U.S. at 555.

[38] This decision is a marked departure from the "rule of reason" which has traditionally governed the scope and nature of NEPA analyses. This rule was developed in the D.C. Circuit, *see* NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), and consistently applied there and in other circuits. *See, e.g.*, Carolina Environmental Study Group v. U.S., 510 F.2d 796, 798 (D.C. Cir. 1975); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1049, 1092 (D.C. Cir. 1973). Under the "rule of reason," the agency has broad discretion under NEPA with respect to the scope and

Had the majority given the Table S-3 rules the "hard look" review demanded by this Court in *Vermont Yankee*, and applied by Judge Wilkey in his dissenting opinion, these rules would have been upheld. *See NRDC II*, slip op. at 38-54 (Wilkey, J. dissenting), *App.* 154a-170a. Judge Bazelon admits in his opinion in *NRDC II* that the Commission developed an extensive record concerning both the factual and policy predicates of its determination, and considered the various uncertainties associated with nuclear waste disposal during the Table S-3 rulemaking.[39] Based on this analysis and the conservatisms underlying the entire Table S-3 rule, and recognizing the uncertainties inherent in any prediction of future environmental effects, the Commission concluded (1) that it was reasonably probable that permanent disposal facilities would

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nature of an EIS as long as it has made a reasonable effort to consider and disclose critical impacts. Thus, the courts of appeals have typically found that NEPA does not compel a formal and precise cost-benefit analysis, and that an agency does not have to quantify uncertain effects as long as its analysis reasonably discloses the effects and associated uncertainties. *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974); Robinson v. Krebel, 550 F.2d 422 (8th Cir. 1977); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975). Judge Bazelon's opinion departs sharply from this traditional law governing the role of courts in reviewing an EIS.

[39] *See NRDC II*, slip op. at 34 n.96 (Bazelon, J.), *App.* 34a. In developing the Table S-3 rule, the Commission examined available technical studies, the testimony of expert witnesses, and information from ongoing work concerning feasible storage and disposal methods. *See NRDC II*, slip op. at 22 n.60, 49-52 (Wilkey, J. dissenting), *App.* 138a-139a, 165a-168a. Furthermore, the Commission conservatively assumed that all volatile radioactive products would be released to the atmosphere before permanent disposal of the waste, in order to portray the worst case impacts of the back end of the fuel cycle. *See NRDC I*, 547 F.2d at 653 n.57; *NRDC II*, slip op. at 30-32 (Wilkey, J. dissenting), *App.* 146a-148a. All of this information is present in the rulemaking record, and summarized in the preamble to the final rule. *See NRDC II*, slip op. at 49-50 (Wilkey, J. dissenting), *App.* 165a-166a. *See also supra* text at 7-10.

be developed, and (2) that such facilities would effectively isolate the remaining nonvolatile portion of the waste from the environment. This is exactly the type of prediction which agencies traditionally make in reaching policy judgments that are the essence of rulemaking.[40]

The lower court's quarrel thus is not that the Commission failed to consider and disclose uncertainties, but that the uncertainties were not resolved in the way in which it would have resolved them. In *Vermont Yankee* and *Strycker's Bay*, this Court unanimously rejected the lower court's attempt to impose additional procedural and substantive requirements on agencies through NEPA. Judge Bazelon's new reading of NEPA is "no more than

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[40] As Judge Wilkey recognizes, since any evaluation of future environmental impacts involves uncertainties, courts "not only expect, [they] demand, expert agencies charged with broad statutory discretion to make predictions en route to factual, technical, and policy judgments." *NRDC II*, slip op. at 5 (Wilkey, J. dissenting), *App.* 121a. *See also id.* at 17, 55-56, *App.* 133a, 171a-172a. Indeed, agency predictions as to future environmental effects are essential if an agency is to comply with the mandate of NEPA to consider and disclose the environmental consequences of its action. *See, e.g., Vermont Yankee*, 435 U.S. at 551, 557-58; Minnesota v. NRC, 602 F.2d 412, 417 (D.C. Cir. 1979); *Carolina Environmental Study Group*, 510 F.2d at 798-800.

As a matter of administrative law, the D.C. Circuit has observed that "[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." *Industrial Union Dep't*, 499 F.2d at 474 n.18. In such instances, the reviewing court is limited to ensuring that "the agency . . . has carried out its task in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules." *Id.* at 475. In other words, in dealing with a still-developing area such as nuclear waste disposal, as long as the agency has taken a "hard look" at the question, has considered the relevant factors, and has proceeded to a reasoned conclusion, it has satisfied the requirements of the APA. *Vermont Yankee*, 435 U.S. at 549, 558; *Izaak Walton League*, 655 F.2d at 372; and *Industrial Union Dep't*, 499 F.2d at 474-75.

a giant step sideways" from *Vermont Yankee*.[41] Barred by *Vermont Yankee* from encroaching on the Commission's discretion in procedural matters, the court below has sought to find authority in NEPA that would lessen the Commission's substantive discretion to make policy determinations. NEPA was not intended to restrict the scope of agency discretion, however, but rather to clarify the scope of the agency's inquiry as to related environmental impacts.

This Court should reject this latest attempt to use NEPA as the basis for curtailing the Commission's policymaking authority. This decision virtually precludes the Commission from proceeding through generic rulemaking to resolve environmental issues on the basis of its expert judgment as to probable future events affecting the licensing process, and dictates how individual licensing boards must consider future environmental effects that are, by their very nature, uncertain. *See NRDC II*, slip op. at 55-56 (Wilkey, J. dissenting), *App.* 171a-172a. As Judge Wilkey concludes, the practical impact of this decision will be to "impos[e] upon the NRC and its licensing boards *an impossible task of predicting this court's response to their activities.*" *Id.* at 58, *App.* 174a (emphasis added); *see infra* text at 26-27.

Where the NRC has in good faith considered and disclosed the environmental effects of the back end of the fuel cycle, it has fulfilled its NEPA obligation. The D.C. Circuit, contrary to the instructions of this Court in *Vermont Yankee*, is merely dictating to the Commission how it must resolve a question Congress has empowered it to decide. *NRDC II*, slip op. at 57 (Wilkey, J. dissenting), *App.* 173a. Certiorari should be granted to correct this serious intrusion into the agency decision-making process which conflicts with the decisions of this Court in *Vermont Yankee* and *Strycker's Bay*.

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[41] *NRDC II*, slip op. at 64 (Wilkey, J. dissenting), *App.* 180a.

II. The Decision of the D.C. Circuit Conflicts With Decisions of This Court and Lower Courts on the Scope of Judicial Review of Agency Actions Under NEPA

The lower court's alternative ground for invalidating the Original and Interim Rules arises from the fact that Table S-3 contains only release values and does not depict "the environmental effects of the fuel cycle in terms of the quantity of land, water, and energy used, and of heat, chemicals and radioactivity released." *NRDC II*, slip op. at 52 (Bazelon, J.), *App.* 52a. The majority argues that NEPA requires an agency to "translate technical effluent data . . . to disclose the environmental impacts of a proposed project to its intended readership." *Id.* at 54 n.149, *App.* 54a. It uses this interpretation to conclude that the Original and Interim Rules violate NEPA because they (1) fail to "reveal the meaning of those [values in Table S-3] in terms of human health or other environmental values," and (2) preclude additional consideration of the meaning of the values in individual licensing proceedings. *Id.* at 53, *App.* 53a.

The majority's complaint thus is with *how* the Commission has disclosed the potential environmental impacts of the fuel cycle, not with whether it has disclosed those potential impacts. The majority has interpreted NEPA to require not only the quantitative disclosure of physical impacts but also a description of those impacts in "layman's" terms deemed appropriate by a reviewing court. *See NRDC II*, slip op. at 52-54 (Bazelon, J.), *App.* 52a-54a.

NEPA leaves the form of disclosure to the agency's discretion.[42] By holding that NEPA requires a particular form of disclosure, the majority has improperly substi-

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[42] *See* NRDC v. Morton, 458 F.2d at 836, 838; *see also Vermont Yankee*, 435 U.S. at 555. It should also be noted that there is nothing in the record which even suggests that translating Table S-3 into health and other terms would signal a significant environmental impact. To the contrary, as the Commission has tentatively determined, translating those quantitative values into health and other terms

tuted its judgment for that of the Commission. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park. v. Volpe*, 401 U.S. 402, 416 (1971). As this Court found in *Strycker's Bay*, "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken." 444 U.S. at 227-28. A writ of certiorari is required to correct this judicial intrusion by the lower court into the NRC's statutory discretion under NEPA.[43]

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shows their insignificance. *NRDC II*, slip op. at 52, 57-59 (Wilkey, J. dissenting), *App.* 168a, 173a-175a; 44 Fed. Reg. at 45,364, col. 2, *App.* 350a. NEPA, of course, does not require disclosure or analysis of insignificant impacts. Trout Unlimited v. Morton, 509 F.2d at 1283.

[43] The majority's conclusion that the values in Table S-3 should be understandable to interested members of the public is strangely reminiscent of an earlier holding by Judge Bazelon in *Aeschliman v. NRC*. In that case, Judge Bazelon held that an Advisory Committee on Reactor Safeguards (ACRS) report should have been returned to the ACRS. Judge Bazelon felt that since the essential information was not contained in a single document and written for a "layman," the report was not acceptable under the APA. 547 F.2d at 631 (Bazelon, J. concurring). In reversing that holding in *Vermont Yankee*, this Court found that Judge Bazelon had improperly dictated to the Commission how to disclose this material, stating:

> The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years, and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.

435 U.S. at 557. The same can be said for Judge Bazelon's effort in this case to dictate the manner in which the Commission must disclose health, socioeconomic and cumulative consequences of stated impacts.

III. A Reviewing Court Cannot Ignore an Agency's Interpretation of Its Rules Unless That Interpretation Is Clearly Erroneous

In vacating the Original and Interim Rules, the majority also improperly substituted its interpretation of those Rules for that of the Commission. On their face, nothing in the Rules precludes consideration of the Table S-3 values in terms of health and other environmental values in individual proceedings. Indeed, the Commission has consistently interpreted the rules to permit discussion of the meaning of the Table S-3 values in individual proceedings.[44] Judge Bazelon nevertheless construes the rules to preclude such consideration.

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[44] Judge Bazelon found that the Final Rule did not preclude consideration of the meaning of the Table S-3 values in individual licensing proceedings, since licensing boards were specifically notified of their ability to consider health, socioeconomic and cumulative consequences of the Table S-3 values in the preface to the Final Rule. *See NRDC II*, slip op. at 55 (Bazelon, J.), *App.* 55a. The preface to the Final Rule, however, also notes that the Commission had never previously stated that such discussions were precluded under the Original and Interim Rules, 44 Fed. Reg. at 45,364, col. 2, *App.* 350a, and that the reason for the clarifying statement as to the Final Rule was simply to resolve any doubt on this question. 44 Fed. Reg. 45,363, col. 3—45,364, col. 1, *App.* 347a-348a.

In addition, the NRC Reports contain *no published decisions* in which interested parties were denied an opportunity to discuss the values in terms of their health, socioeconomic or cumulative consequences. To the contrary, the NRC has expressly permitted a separate discussion of radiation-associated health effects, requiring applicants in one case to compare an alternative coal-fired plant to a proposed nuclear plant. *In re* Tennessee Valley Authority (Hartsville Nuclear Plant Units 1A, 2A, 1B and 2B), 5 NRC 92, 103 n.52 (1977). In another reported licensing proceeding, all parties were expressly allowed to file supplemental testimony on the health effects issue. *In re* Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), 7 NRC 179, 187 (1978). As noted above, in promulgating the Final Rule, the Commission reaffirmed that it had never precluded discussion of health, socioeconomic and cumulative questions in individual proceedings. 44 Fed. Reg. 45,364, col. 2, *App.* 350a.

It is well established that an agency's interpretation of its own regulations is given "controlling weight" even if it is only one of a number of reasonable interpretations. *See Northern Indiana Public Service Co. v. Izaak Walton League*, 423 U.S. 12, 15 (1975); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). Judge Bazelon's opinion ignores and contradicts the Commission's reasonable interpretation of its own rules. This failure to give proper weight to the NRC's interpretation should be corrected through a writ of certiorari.

IV. The D.C. Circuit's Opinion Could Seriously Disrupt the Nuclear Power Industry and Adversely Affect Electric Utilities and Their Consumers

Since the Commission has compiled an extensive record on the effects of the back end of the fuel cycle and performed a conservative analysis in arriving at its "zero release" value, the conclusions of either the Commission or individual licensing boards are unlikely to change with further proceedings.[45] The result reached by the D.C. Circuit thus may produce new rulemaking proceedings, licensing work, and delay, but it will not produce any tangible benefits to the public.

The D.C. Circuit's decision to vacate all three versions of the Table S-3 rule could throw open for review scores of nuclear plant licenses issued in the past, and create substantial doubts about future nuclear licensing proceedings. Since the issuance of the Orginal Rule in 1974, the records underlying more than 90 construction permits

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[45] *See NRDC II*, slip op. at 57-58 (Wilkey, J. dissenting), *App.* 173a-174a. *See supra* note 42.

and operating licenses have included the values contained in Table S-3. In addition, approximately 45 of these permits or licenses have been specifically conditioned on the ultimate resolution of the validity of Table S-3. The licenses of five power plants are currently being challenged in the courts of appeals on grounds relating to Table S-3.[46]

Thus, the immediate administrative and judicial repercussions of the D.C. Circuit's decision are apparent. For plants with operating licenses, licensing decisions may be reopened and additional administrative proceedings compelled. For plants with construction permits, similar additional proceedings may be required which may result in construction delays and hence delays in the ultimate commercial operation dates of the affected plants that can cost millions of dollars.[47] These costs to the operating utility, to its customers and to society in general should be avoided where, as here, those costs will produce no benefits.

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[46] *See supra* note 7. All of these proceedings are currently in abeyance pending the outcome of this proceeding. On August 16, 1982, the D.C. Circuit issued a series of orders involving five of these proceedings, *App.* 219a. In *Lloyd Harbor, Aeschliman, Saginaw Valley,* and *Coalition for the Environment,* the petitioners were required to file statements on or before September 8, showing why the petitions for review of the NRC orders granting construction permits should not be dismissed, and the Commission be required to comply with the mandate of *NRDC II* in on-going operating license proceedings. *App.* 221a. In *Vermont Yankee,* all parties were required to file statements showing cause why the court should not remand the matter to the NRC for reexamination of Vermont Yankee's full power operating license.

[47] For instance, delay in the operational date of a nearly completed, two billion dollar nuclear power plant can result in additional carrying costs of $30-40 million per month.

V. The D.C. Circuit's Opinion Will Create Administrative Confusion and Further Burden the Federal Courts

In *Vermont Yankee*, this Court directed the D.C. Circuit to determine on remand whether the NRC had taken a "hard look" at the potential environmental impacts of nuclear waste disposal. As described above, the D.C. Circuit has ignored the direction of this Court and imposed on the NRC a novel interpretation of NEPA, giving NEPA an important substantive dimension.

The D.C. Circuit's unanticipated reading of NEPA will needlessly complicate the implementation of NEPA and impose heavy, unnecessary burdens on all Federal admintrative agencies and courts. Since the orders of virtually every federal agency are subject to review by the D.C. Circuit,[48] each agency must heed every major decision by that court affecting environmental or administrative law. As a result, that court has far greater influence on the evolution of environmental and administrative law than any other judicial circuit.

If the decision below stands, agencies will be required to engage in more expensive and time consuming proceedings to analyze all facets of the "uncertainties" underlying future environmental effects, to identify in each and every individual case the most remote and improbable "worst case" impacts that may result from the proposed action, and to conduct exhaustive probability analyses of these remote impacts in individual licensing proceedings.[49] Since practically any future environmental effect is fraught with uncertainty as to whether the effect will

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[48] *See, e.g.*, 28 U.S.C. §§ 2342(4), 2343 (NRC); 28 U.S.C. §§ 2342(1), 2343 (Federal Communications Commission); 28 U.S.C. §§ 2342(3), 2343 (Federal Maritime Commission); 42 U.S.C. § 7607(b)(1) (Environmental Protection Agency).

[49] This is made clear by a recent case—Potomac Alliance v. NRC, 682 F.2d 1030 (D.C. Cir. 1982)—in which Judge Bazelon, citing his opinion in *NRDC II*, spells out in some detail the substantive constraints which he believes NEPA imposes on the NRC in an individual licensing proceeding. *See supra* note 37.

occur and the potential magnitude of the effect, the D.C. Circuit's opinion entails a basic restructuring of how agencies go about conducting NEPA analyses.[50]

In turn, the burden on the federal court system in reviewing these NEPA decisions will increase, given the responsibility this decision delegates to courts of appeals to review an agency's consideration of uncertainties to determine whether the agency has, in each case, evaluated and taken into account each remote event that might produce a significant impact.[51] Where uncertainties are unavoidable, this NEPA gloss would tend, inevitably and

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[50] As Judge Wilkey recognizes, under Judge Bazelon's decision:

> The agency cannot be sure that another aspect of its rule or procedure will not be discredited in a future appeal unless it hunts down every factor it can think of and attempts somehow to qualify and evaluate its uncertainties as "environmental costs," an equivalence which has not been thought to exist before. It goes without saying that such an effort would require an enormous commitment of agency time and resources. The only certainty achievable by this process—and it *will* be achieved—is *delay* in the development of nuclear power.

NRDC II, slip op. at 58 (Wilkey, J. dissenting) (emphasis in original), *App.* 174a.

Interestingly, at oral argument before the lower court, counsel for petitioner NRDC argued that a repository leak once every 2,500 years was of substantial concern and needed to be reflected in the Table S-3 rule. The risk of such an occurrence is less than that of a given person dying on a given day from a volcanic eruption or common influenza. *See NRDC II*, slip op. at 61-64 (Wilkey, J. dissenting), *App.* 177a-180a. A requirement that the Commission identify, evaluate, and quantify all risks of this magnitude would impose burdens never contemplated by NEPA.

[51] In 1979 alone approximately 1,200 EISs (including drafts and finals) were prepared and filed by 89 federal agencies. Federal actions under NEPA were challenged in 139 lawsuits. Council on Environmental Quality, *Environmental Quality*, 11th Annual Report (1980) at 384; Council on Environmental Quality, *Environmental Quality*, 12th Annual Report (1981) at 260. In 1980, there were almost 1,000 EISs filed, with 140 lawsuits filed under NEPA. Twelfth Annual Report at 183, 260. All of these proceedings could be greatly complicated by the lower court's decision.

improperly, to bias agency policy choices in favor of "no action" and maintenance of the status quo.

While Congress has mandated consideration and disclosure of the environmental impacts of major agency action, the responsibility to implement this requirement has been given to the agencies. It is not in the public interest to allow the Federal courts to second guess an agency's well-reasoned policy choices on (1) whether to handle an issue generically or in multiple adjudications, and (2) the predicted outcome of an issue subject to uncertainties. As Judge Wilkey recognized, "we as a court are unauthorized to create and ill-equipped to manage" the novel standard created by the majority opinion. *NRDC II*, slip op. at 3 (Wilkey, J. dissenting), *App.* 119a. Certiorari should be granted to correct this excess.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: September 24, 1982

APPENDIX

List of Petitioners Baltimore Gas and Electric Company, *et al.*, Parents, Subsidiaries, and Affiliates Pursuant to Supreme Court Rule 28.1

BALTIMORE GAS AND ELECTRIC COMPANY

Subsidiaries and Affiliates

Safe Harbor Water Power Corporation

BOSTON EDISON COMPANY

Subsidiaries and Affiliates

Connecticut Yankee Atomic Power Company
Yankee Atomic Electric Company

CAROLINA POWER & LIGHT COMPANY

Subsidiaries and Affiliates

Capitan Corporation
Leslie Coal Mining Company
Carolinas-Virginia Nuclear Power Ass'n, Inc.
McInnes Coal Mining Company

CONSUMERS POWER COMPANY

Subsidiaries and Affiliates

Canyon Homesteads, Inc.
Michigan Gas Storage Company
Michigan Utility Collection Service, Inc.
Northern Michigan Exploration Company
Platcares Resources, Ltd.

LONG ISLAND LIGHTING COMPANY

Subsidiaries and Affiliates

LILCO Energy Systems, Inc.

NORTHEAST UTILITIES SERVICES COMPANY

Subsidiaries and Affiliates

Connecticut Light & Power Company
Connecticut Gas Company
Electric Power, Inc.
Connecticut Transmission Corporation
Shelton Canal Company
Windsor Locks Canal Company
City & Suburban Electric Gas Company
Research Park, Inc.
Hartford Electric Light Company
Nutmeg Power Company
Mohawk Gas Company
Connecticut Steam Company
Holyoke Water Power Company
Holyoke Power and Electric
Northeast Nuclear Energy Company
Quinnehtuk Company
Rocky River Realty Company
Western Massachusetts Electric Company

THE CONNECTICUT LIGHT AND POWER COMPANY

Parent

Northeast Utilities Services Company

Subsidiaries and Affiliates

City & Suburban Electric Gas Company
Connecticut Gas Company
Connecticut Transmissions Corporation
Electric Power, Inc.
Shelton Canal Company
Research Park, Inc.
Yankee Atomic Electric Company

THE HARTFORD ELECTRIC LIGHT COMPANY

Parent

Northeast Utilities Services Company

Subsidiaries and Affiliates

Yankee Atomic Electric Company

NORTHEAST NUCLEAR ENERGY COMPANY

Parent

Northeast Utilities Services Company

WESTERN MASSACHUSETTS ELECTRIC COMPANY

Parent

Northeast Utilities Services Company

Subsidiaries and Affiliates

Yankee Atomic Electric Company

PACIFIC GAS AND ELECTRIC COMPANY

Subsidiaries and Affiliates

Alaska California LNG Company
Alberta & Southern Gas Company, Ltd.
Alberta Natural Gas Company, Ltd.
Calaska Energy Company
Eureka Energy Company
Gas Lines, Inc.
Natural Gas Corporation of California
Pacific Gas Transmission Company
Pacific Transmission Supply Company
Pacific Gas LNG Terminal Company
Pacific Gas Marine Company
Pacific Indonesia Lighting Company
Standard Pacific Gas Lines, Inc.
Standard Pacific Gas Line, Inc.

PENNSYLVANIA POWER & LIGHT COMPANY

Subsidiaries and Affiliates

Arcadia Company, Inc.
BDW Corporation
Development Company
Greene Hill Coal Company
Greene Manor Coal Company
Interstate Energy Company
LCA Leasing Corporation
Oneida Mining Company
Pennsylvania Mines Corporation
Realty Company of Pennsylvania
Rushton Mining Company
Safe Water Power Corporation
Service Development Company
Tunnehon Mining Company
Uranium Resources, Inc.

PHILADELPHIA ELECTRIC COMPANY

Subsidiaries and Affiliates

Conowingo Power Company
Eastern Pennsylvania Development Corporation
Adwin Realty Corporation
Adwin Equipment Corporation
Eastern Pennsylvania Exploration Company
Philadelphia Electric Power Company
Susquehanna Power Company
Susquehanna Electric Company

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Subsidiaries and Affiliates

Energy Development Corporation
PSE&G Research Corporation
Energy Terminal Services Corporation
Energy Pipeline Corporation

SAN DIEGO GAS & ELECTRIC COMPANY

Subsidiaries and Affiliates

New Albion Resources Company

SOUTHERN CALIFORNIA EDISON COMPANY

Subsidiaries and Affiliates

Associated Southern Investment Company
Bear Creek Uranium Company
Calabasas Communications Company
Calabasas Park Company
Electric Systems Company
Energy Services, Inc.
Mono Power Company
Mono Green Mountain Company
Palo Verde Uranium Venture
Southern Calif. Edison Finance Company
Southern Surplus Realty Company

VIRGINIA ELECTRIC AND POWER COMPANY

Subsidiaries and Affiliates

Laurel Run Mining Company
Virginia Nuclear, Inc.

YANKEE ATOMIC ELECTRIC COMPANY

Parents

Boston Edison Company
Cambridge Electric Light Company
Central Maine Power Company
Central Vermont Public Service Company
Connecticut Light & Power Company
Hartford Electric Light Company
Montaup Electric Company
New Bedford Gas & Electric Company
New England Power Company
Public Service of New Hampshire
West Massachusetts Electric Company

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